IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 216 OF 2005

Shri Prabhakar Xembhu
Bhandari, Major of age,
married, Residing at
House No.372 Beokegal,
Curchorem, Goa. ... Applicant

versus

1. Shri Surendra V. Pai,
   Retired Bank Employee,
   Resident of Vassant Prabha,
   Behind Housing Board Colony,
   Near KTC Bus Stand,
   Ponda Goa.

2. State of Goa
   (through P.P.) ... Respondents

Mr. Arun Bras De Sa, Advocate for the Applicant.

Mr. M. S. Sonak with Mr. P. S. Rao, Advocates for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 24TH MARCH, 2006.

ORAL ORDER

The short question for consideration before this Court is

whether the exercise of discretion by the learned J.M.F.C. in rejecting the application dated 11-3-2005 is proper and legal?

2. To answer the said question a few facts are required to be stated. The applicant herein is the accused in C.C. No.412/OA/04/B in which he is being prosecuted by the respondent/Complainant under Section 138 of the Negotiable Instruments Act, 1881(Act, for short) for bouncing of two cheques in the sum of Rs.3,35,000/- and Rs.60,000/- dated 4-12-2003 and 4-7-2004 respectively. The applicant/accused did not deny that he had signed the said two cheques but it was his contention that the body of the cheque or the remaining particulars were not written by him. Likewise, it was his contention that he had not signed the A.D. card of the statutory notice sent to him by the Complainant.

3. After the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, 1973(Code, for short), the accused filed an application dated 11-3-2005 praying therein that the said two cheques be sent to the handwriting expert(Government Examiner of Questioned Documents) at Hyderabad along with the specimen writings of the accused to find out whether the writings on the said cheques are really of the accused or not. Likewise, the accused also prayed that the signature

on the A.D. card may also be sent for comparison to find out whether the signature therein was really that of the accused. Admittedly, the said application was filed under Section 254(2) of the Code.

4. The learned J.M.F.C. referred to the case of **Lilykutty** v. **Lawrance**(2003(2) DCR 610) to say that no law provided that the entire body of the cheque had to be written by the drawer and also to the case of **K. Bhaskaram** v. **Shankar V. Balan**(1999 Cri.L.J. 606) to say that once the sender had despatched the notice by post with the correct address written on it then it is deemed to have been served on the sender unless the sender proves that it was not really served. The learned trial Court also came to the conclusion that it was not material to find out whether the contents of the cheque were in the handwriting of the accused or not. The learned trial Court also felt that the opinion of the handwriting expert would not help the Court to decide on the controversy/dispute between the parties but would only delay the trial of the case and, therefore, proceeded to dismiss the application filed by the accused.

5. The accused filed a revision against the said Order of the learned J.M.F.C. to the Court of Sessions but the learned Additional Sessions Judge by her Order dated 14-9-2005 proceeded to dismiss the

same. In dismissing the revision application the learned Additional Sessions Judge observed that a perusal of the cross-examination of the Complainant had revealed that it was suggested to him that the said cheques were issued without date and amount and the said date and amount were filled in by the Complainant without the knowledge or acknowledgement of the accused. The learned Additional Sessions Judge relying on the same Judgments as relied upon by the trial Court, came to the conclusion that sending the said cheques and the A.D. card would be a futile exercise and, therefore, no interference was called for with the impugned Order.

6. The said Orders of the Courts below are now under challenge in a petition filed under Section 482 of the Code and it is the contention of the accused that his defence has been seriously prejudiced by not sending the said cheques and the said A.D. cards for the opinion of the said handwriting expert since by not sending the same the accused would be prejudiced from rebutting the presumption available in favour of the Complainant. The accused has also contended that the Court ought not to take the role of the handwriting expert specially when the handwriting is disputed by the accused. On behalf of the Complainant, an affidavit has been filed and along with the affidavit a letter dated 4-12-2003 sent by the accused to the Complainant has been filed stating that the said two cheques

were sent by the accused along with the said letter and, therefore, the contention of the accused that the said cheques were not written by the accused and had only signed the same is totally false. It is not disputed that the said letter has been produced by the Complainant as Exh. C in the trial of the said case.

7. Mr. Arun Bras De Sa, the learned Counsel on behalf of the accused has referred to certain provisions of the Criminal Manual issued by this Court to support the submission that even a private individual could send documents to a Government Expert. At page 87, para 27 of the said Criminal Manual, issued for guidance of Criminal Courts, it is stated that the authority of the Courts to issue summons for the appearance of the Government Expert in handwriting should be exercised with due discretion and he should not be called upon to appear in cases which are of a comparatively unimportant nature, or in which his evidence is likely to be of doubtful utility. No summons to give evidence should be issued to the above Expert by any Civil Judge or without the concurrence of the Sessions Judge. Para 28 provides that the previous sanction of Government should be obtained in all cases in which it is proposed to utilise the services of the Government Examiner of Questioned Documents, except when the reference is made at the request and the expense of a party to Civil or

Criminal Case. It has been submitted on behalf of the accused that the accused will bear all the expenses which would be required to be met in connection with sending the said cheques/A.D. card to the said Government Expert and also in connection with his examination before the Court. Mr. Bras De Sa has, therefore, submitted that the said cheques/A.D. cards be sent to the Government Expert along with the said application dated 4-12-2003, the Vakalatnama filed by the accused and the 313 Statement so that the handwritings on the said questioned documents could be compared with the admitted handwritings of the accused, before the Court.

8. On the other hand, Mr. M. S. Sonak, the learned Counsel on behalf of the Complainant, relying on the very same Judgments has submitted that no purpose would be served by sending the said documents in view of the admitted position in law which makes it immaterial whether the body of the cheque is written by the accused or someone else as long as the cheque has been signed and delivered by the accused himself. Mr. Sonak has referred to a Judgment of this Court in the case of **The Vasco Urban Co-op. Credit Society Ltd.** v. **Mrs. Shoba D. Korgaonkar**(2005(1) Goa L.R. 452) and has submitted that the Court should not adopt any interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure and that any other

interpretation could be proved to lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice, and, also to another observation which states that it could not be ruled out that a cunning accused person may just scribble his signature on the A.D. card that such a notice was not received by the accused. Mr. Sonak has also submitted that the discretion under Section 254(2) is certainly narrower than the discretion conferred on a Court under Section 243(2) of the Code and which discretion being in a warrant case is wider than in a summons case.

9. Section 254 of the Code deals with the procedure when an accused is not convicted in a case triable as a summons case and Sub-Section (2) thereof provides that the Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any person directing him to attend or to produce any document or other thing.

10. As far as an accused signing a cheque and not signing the body of the cheque is concerned, this Court in the case of **Mrs. Shila @ Sudha Manjunath Vernekar** v. **Mr. Rayaba S. Dessai and another** (unreported decision dated 27-1-2005 in Criminal Revision Application No.29 of 2004)

has stated thus:-

> "It appears that there is preponderance of judicial opinion in favour of the proposition that when a cheque is issued duly signed by the drawer and the holder completes the same in other respects namely as regards the amount due and the date, the presumption would still be available to the complainant/holder unless the accused shows that the said particulars were filled in without the consent of the accused/drawer".

11. The said legal position is based on the principle that in such cases there is a tacit or implied consent by the drawer to fill in the details of the amount and date of the cheque. "I will give you a blank signed cheque" is an expression which we heard very often even before prosecutions under Section 138 of the Act came to be lodged and the said expression signifies that the drawer gives authority to holder or payee to complete the cheque in all respects including the amount to be filled in and the date and to present it for payment and obtain the payment due thereon. As far as the receipt of the notice by the accused was concerned both the Courts below have placed reliance on the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** (supra) which lays down the principle that when the notice is addressed to the correct address of the drawer of the cheque/accused and is

sent by registered post the same is deemed to have been received by the addressee. As far as this case is concerned one does not know why the applicant/accused has chosen not to displace the presumption available to the Complainant by virtue of Section 27 of the General Clauses Act by examining the postman. But the accused has shown his inclination to examine a handwriting expert.

12. There is no doubt that Section 254(2) of the Code is meant to give a fair opportunity to an accused to defend his case by producing his evidence. That is a basic rule of a fair trial. Nevertheless in a given case it would be the discretion of the trial Court whether the accused should be allowed to produce witnesses in support of his defence. The general rule is that an opportunity should be given to an accused to adduce evidence so as to rebut the evidence led on behalf of the Complainant but that liberty cannot be unfettered so as to prolong the proceedings and the trial Court is always within its discretion to put a stop to it. In a given case it is the overall situation which a trial Court would be required to assess particularly bearing in mind the onus of proof. If no meaningful purpose would be served by allowing the accused to examine witnesses, then the trial Court would be within its discretion to reject the request to summon witnesses. In the case at hand, there is no dispute that the cheques in question were not

only signed by the accused but they were written by him as well and not only that they were sent along with a letter dated 4-12-2003. In a situation like this, no useful purpose would have been served, by sending the said cheques to a handwriting expert; considering the position of law as it stands that in the matter of the body of the cheque not being written by the accused or the A.D. card not being signed by him, still the presumption under the Act would be available in favour of the Complainant. Moreover, one does not know also as to how long the entire process of sending the said documents and obtaining the opinion would take. Likewise, one also does not know whether at a given time how quickly the handwriting expert would be available to be examined in the case after he gives an opinion. It is common knowledge that the Government handwriting experts remain busy with the Government work entrusted to them and many a times take months if not years to come and depose in support of the opinion they have given. In this context, it will be interesting to take note of the objects and reasons which compelled Parliament to pass the Amendment Act 55/2002. It was noted by Parliament that the existing provisions in the Act have been found to be deficient in dealing with dishonour of cheques, not only the punishment provided in the Act has proved to be inadequate but the procedure prescribed for the Courts to deal with such matters has also been found to be cumbersome and the Courts are unable to dispose of the cases

expeditiously in a time bound manner in view of the procedure contained in the Act as a result of which a large number of cases are reported to be pending in various Courts in the Country. Keeping that in mind the said Amendment Act 55/2002 was passed, inter alia, with a view to expedite the procedure by dispensing with preliminary evidence, by providing special procedure of service of summons, to provide for summary trial, etc. and all this was done with a view to speed up the disposal of the cases. Sending the cheque/s to the handwriting expert when not required to be sent, would only add to the delay in the cases. It is common knowledge that it is the accused would always tend to gain by delay than anybody else.

13. I have perused the decisions cited on behalf of the applicant. The case of **Abdul Gafoor** v. Abdurahiman(2003 ALL MR(J) 17) and the case of **Sreedhar Pillay and others** v. **P. J. Alexander and another** (1992 CRI. L.J. 3433) were decided by Kerala High Court either before or unmindful of Division Bench decision of that Court in **Lilykutty** v. **Lawrance** (supra) wherein it was held that presumption would still be available, until contrary is proved, when the cheque is signed by the drawer but the amount written is not in his handwriting. So is the case of **M/s. Ryam Commerce & Plantation Ltd.** v. **Motilal Baid and another** (2001 ALL MR(Cri.) Journal 14).

14. Considering the evidence led by the Complainant in the light of the defence taken by the accused which even if proved would give no benefit to the accused, refusal to send the said documents namely, the cheques and the A.D. card for the opinion of the Government handwriting expert could not be faulted.

15. In view of the above, I find there is no merit in this application and consequently the same is hereby dismissed. The learned trial Court to decide the case uninfluenced by the observations made herein.

N. A. BRITTO, J.

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